BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Supreme Court.

The opinion of the Supreme Court of Minnesota is reported in 14 N. W. (2d) 773. It appears in the printed record, pages 266 to 278 inclusive.

II.

Jurisdiction and Statement of Case.

Reference is hereby made to the foregoing Petition under the headings "Summary and Short Statement of Matter Involved" and "Jurisdiction" for discussion of these two points.

III.

Specifications of Error.

The Supreme Court of Minnesota erred:

1. In affirming the Order and Decree of the District Court of Hennepin County, Minnesota.

2. In holding that income-producing real estate owned by respondent is exempt from taxation because of the provisions of Chapter 43, Laws of the Territory of Minnesota for 1854.

3. In holding that the territorial legislature had power to grant an irrevocable exemption in perpetuity.

4. In holding that the grant of exemption constituted a contract binding on the State of Minnesota.

5. In refusing to hold that the grant of exemption was null and void under the Constitution and Laws of the United States particularly:

(a) Act of Congress of March 3, 1849 (Organic Act of Minnesota).

(b) Act of Congress of May 11, 1858 (Act admitting State of Minnesota to the Union).

(c) Article 1, Secs. 8 and 9 of the Constitution of the United States.

(d) Fifth Amendment to the Constitution of the United States.

(e) Tenth Amendment to the Constitution of the United States.

6. In refusing to hold that the grant of exemption was a revocable privilege, and as such, was revoked both by the Act of Admission and the adoption of the State Constitution.

7. In holding that respondent, as a matter of law, did not forfeit or abandon its right to exemption by suspension of its teaching functions.

IV.

Argument.

A. Summary of State Supreme Court's Opinion.

The Supreme Court of Minnesota, in holding respondent's property was exempt from taxation, felt constrained to follow and adhere to the decision in the early case of *County of Nobles* v. *Hamline University*, 46 Minn. 316, 48 N. W. 1119, which it apparently deemed to be supported by *Home of the Friendless* v. *Rouse, supra*, and *Washington University* v. *Rouse, supra*. In *County of Nobles* v. *Hamline University, supra*, the Court held that the territorial legislature

of Minnesota had power to grant and did grant to the Trustees of the Hamline University by the provisions of Chapter 43, Laws of the Territory of Minnesota for 1854, an irrevocable exemption binding on the present state. The Court's sole authority for its holding was *First Div. etc. R. Co.* v. *Parcher,* 14 Minn. 297 (Gil. 224).

First Div. etc. R. Co. v. *Parcher, supra,* involved a territorial charter provision for a 3% gross earnings tax "in lieu of all taxes and assessments whatever." Disregarding this provision the State attempted to tax certain lands of the company on an ad valorem basis. These lands had been given to the railroad by the State which had received them from the United States under an Act of Congress to aid the construction of certain railroads. The court held the 3% gross earnings tax provision of the railroad charter to be an irrevocable contract covering taxation of both the land grant lands and operating properties of the company.

Subsequently, the exemption of these so-called land grant lands until sold was sustained on the grounds that it was an agreement made in execution of a trust imposed on the State by the United States. *Stearns* v. *Minnesota,* 179 U. S. 223, 21 S. Ct. 73, 45 L. E. 162, reversing *State ex rel. Marr* v. *Stearns,* 72 Minn. 200, 75 N. W. 210. However, an increase in the gross earnings tax on the operating property of the railroad to 4% was sustained, and that portion of the opinion of the Court in the *Parcher* case which related to contract right under its charter was rejected as obiter dictum. *Great Northern Railway Company* v. *Minnesota,* 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446, affirming 106 Minn. 303, 119 N. W. 202. In *Trustees of Pillsbury Academy* v. *State,* 204 Minn. 365, 283 N. W. 727, aff'd per curiam, 308 U. S. 506, 60 S. Ct. 92, 84 L. E. 433, the Court said that "by the decision in the *Great Northern* case (106 Minn. 303, 119 N. W. 202), *First Division St. Paul and Pacific R. Co.* v. *Parcher,* 14

Minn. 297 (Gil. 224), and quite a catalog of similar cases following it, were in part distinguished and impliedly at least disapproved."

Every statement of law in the *Parcher* case except that relating to the trust involved in the handling of land grant lands by the territory for the United States was fully discredited and rejected. *Great Northern Railway Company* v. *Minnesota, supra; Stearns* v. *Minnesota, supra; Trustees of Pillsbury Academy* v. *State, supra.*

In the instant case, however, the Supreme Court of Minnesota apparently revives and approves the contract holding of the *Parcher* case on which the decision in *County of Nobles* v. *Hamline University, supra,* was predicated, saying of the *Parcher* case: "we are favorably impressed with it."

A Schedule to the Minnesota Constitution of 1857 contained two provisions. The first declared:

> (1) "* * * that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place; * * *"

The second provided:

> (2) "All laws now in force in the territory of Minnesota not repugnant to this constitution shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature."

The Minnesota Supreme Court clearly indicated that it was only as a contract right such as would be protected by the United States Constitution that the grant of exemption was affected by the first provision of the Schedule. It said:

> "The adoption of the state constitution, upon which reliance is placed for the present claim of right to tax Hamline's property, could not change its granted rights if these were contractual obligations."

and, further,

> "In addition, the people of the state, in adopting their constitution, recognized and assumed the validity of all existing contract obligations and rights created thereby."

In *First Div. etc. R. Co.* v. *Parcher, supra*, the Court, after holding that the charter grant was a contract protected by the United States Constitution, referred to Sec. 1 of the Schedule to the State Constitution as "perhaps unnecessary," which no doubt it was, in view of the protection afforded by Article 1, Sec. 10 of the Federal constitution.

The Supreme Court, in addition to stressing *Home of the Friendless* v. *Rouse, supra*, and *Washington University* v. *Rouse, supra*, placed great reliance on the case of *Board of Trustees for Vincennes University* v. *State of Indiana*, 55 U. S. (14 How.) 268, 14 L. E. 416, which seems to be wholly inapplicable to this situation. In that case, there being a direct grant by Congress of certain lands for the use of a seminary, the only question was whether title to a particular tract of property had vested in the university. The case of *Perry* v. *United States*, 294 U. S. 330, 55 S. Ct. 432, 79 L. E. 12, cited by the Court, is inapplicable because no question concerning the surrender of sovereignty was there involved.

Res Judicata Not Considered by State Supreme Court.

The Supreme Court of Minnesota in adhering to its decision in the early *Hamline University* case did not invoke the doctrine of res judicata as did the Court of first instance in addition to its holding on the contract phase of the charter grant. The only reference thereto in the opinion is the Court's statement that "in this case Hamline has urged as an additional reason for affirmance the doctrine of *res judicata* of what was there *(County of Nobles* v. *Hamline University)* determined." It is clear from the discussion of

the early *Hamline University* case, as well as other cases relating to the powers vested in the territorial legislature, that the Supreme Court based its decision solely on the merits of the questions presented for consideration.

The Supreme Court of Minnesota has evinced a desire to have the Federal questions here presented finally decided on the merits by this Court. *Trustees of Pillsbury Academy* v. *State, supra.*

This Court will not assume that the State Supreme Court invoked the doctrine of res judicata so as possibly to limit its right to review in the absence of a direct holding. See concurring opinion of Chief Justice Hughes in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 60 S. Ct. 215, 84 L. E. 537.

B. Lack of Power to Grant Irrevocable Exemption.

Territories Not "Sovereign"

Territorial statutes depend for authority on the Acts of Congress and must conform thereto and to the Constitution of the United States. Corpus Juris, Vol. 59, "Statutes," Sec. 12, page 523; *Domenech* v. *National City Bank*, 294 U. S. 199, 55 S. Ct. 366, 79 L. E. 857.

A clear distinction exists between the powers of territorial and state governments. Corpus Juris, Vol. 62, "Territories," Secs. 8 and 9, pp. 788-790 incl.

In *Domenech* v. *National City Bank, supra*, this Court stated (p. 204): "Puerto Rico, an island possession, like a territory, is an agency of the Federal government, having no independent sovereignty, comparable to that of a state in virtue of which taxes may be levied. Authority to tax must be derived from the United States."

Discriminatory Taxation by an Agency of Congress is Prohibited by the United States Constitution and Organic Act of the Territory.

The exemption granted to the respondent in its charter applies to all its property, regardless of the use made of it, and in perpetuity. The exemption was patently arbitrary and discriminatory, and one not based on any classification of property for taxation purposes. As stated by this Court in *Berryman* v. *Whitman College*, 222 U. S. 334, 32 S. Ct. 147, 56 L. E. 225: "It is the contract of exemption which, in the very nature of things, characterizes the grant as a special privilege."

Article 1, Secs. 8 and 9 of the United States Constitution required a measure of equality and uniformity of taxation by the Congress and the territorial legislature. *Loughborough* v. *Blake*, 18 U. S. (5 Wheat.) 317, 5 L. E. 98; *Gibbons* v. *District of Columbia*, 116 U. S. 404, 6 S. Ct. 427, 29 L. E. 680; *Peacock* v. *Pratt*, 121 Fed. 772.

The inhibition of the Fifth Amendment to the Constitution applies to the Federal government and agencies set up by Congress for the government of the territory. *Farrington* v. *Tokushige*, 273 U. S. 284, 47 S. Ct. 406, 71 L. E. 646. It is well established that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment. *Heiner* v. *Donnan*, 285 U. S. 312, 326, 52 S. Ct. 358, 361, 76 L. E. 772.

Sec. 6 of the Organic Act prohibited discriminatory taxation. *McComb* v. *Bell*, 2 Minn. 295 (Gil. 256). The parties hereto stipulated that "there was a substantial amount of property in the territory of Minnesota subject to taxation under the general laws of the territory and then owned by residents and non-residents of the territory" (R. 94).

The portion of the opinion in the *Parcher* case holding that the railroad charter tax provision was not void as discriminatory under the Organic Act of the territory, has been reconciled by this Court on the basis that it was presumed that the commuted taxes paid by the railroad were a fair equivalent of the taxes which would have been paid on an ad valorem basis as in *McHenry* v. *Alford*, 168 U. S. 651, 18 S. Ct. 242, 42 L. E. 614; *Stearns* v. *Minnesota, supra.*

C. Exemption Does Not Constitute a Contract Binding on State.

It is very clear that there is nothing in the United States Constitution which contemplates or authorizes any direct abridgment by national legislation of the power of states to tax. *Lane County* v. *Oregon*, 74 U. S. (7 Wall.) 71, 19 L. E. 101; *Texas* v. *White*, 74 U. S. (7 Wall.) 700, 19 L. E. 227.

A territorial statute, even though it contains all the elements of a contract is subject to the plenary power of Congress and may be repealed by an Act of Congress. *Mormon Church* v. *United States*, 136 U. S. 1, 10 S. Ct. 792, 34 L. E. 478; *Welch* v. *Cook*, 97 U. S. (VII Otto) 541, 24 L. E. 1112.

The Organic Act of Minnesota, Sec. 6, provided "all the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved, shall be null and of no effect." The absence of any act by Congress is not to be construed as a recognition of the power of the legislature to pass laws in conflict with the Act of Congress under which it was created. *Clayton* v. *Utah Territory*, 132 U. S. 632, 10 S. Ct. 190, 33 L. E. 455.

However, even if Congress had approved or enacted the legislation it would be subject to the same legal objections. *Welch* v. *Cook, supra.*

Exemption is a "Revocable Privilege" and Not a "Contract Right" Protected by Article 1, Sec. 10 of the United States Constitution.

Where there exists in the legislative power the right to amend or modify the grant of exemption, it is merely a "revocable privilege" and not a "contract right." *Citizens Savings Bank* v. *Owensboro*, 173 U. S. 636, 19 S. Ct. 530, 43 L. E. 840; *Seton Hall* v. *So. Orange*, 242 U. S. 100, 37 S. Ct. 54, 61 L. E. 170; *Troy Union R. R. Co.* v. *Mealy*, 254 U. S. 47, 41 S. Ct. 17, 65 L. E. 123.

In *Trustees of Dartmouth College* v. *Woodward*, 17 U. S. (4. Wheat.) 518, 4 L. E. 627, Justice Story in his concurring opinion clearly stated in three different places that had the right to amend the charter been reserved to the legislature, the principles of the decision would not apply.

Properly Construed as a Revocable Privilege, the Purported Exemption Repealed by State Constitution and Statutes.

The exemption grant was repugnant to the constitution of the State of Minnesota. *State* v. *Chicago Great Western Railway Co.*, 106 Minn. 290, 119 N. W. 211; *State* v. *Great Northern Railway Company*, 106 Minn. 303, 119 N. W. 202; *Great Northern Railway Company* v. *Minnesota*, 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446.

The right of modification and repeal being inherent in Congress existed in the instant case until the first moment of existence of the State of Minnesota. Full right to enact its own laws was given by Congress to the new State as an incident of transferred sovereignty. This included the right to supersede the territorial enactments. This the state did, by the adoption of its constitution. There being no irrepealable contract, no right of the respondent was violated by the adoption of the constitutional prohibition. *Welch* v. *Cook*, *supra*.

As a Revocable Privilege, the Purported Exemption was Repealed by Act of Congress of May 11, 1858 (Act of Admission).

The Congressional Act of May 11, 1858 declared that the State of Minnesota be "admitted into the Union on an equal footing with the original states in all respects whatever."

The power given to Congress by Article 4, Sec. 3 of the Federal constitution is to admit new states which are equal in power, dignity and competency to assert the residuum of sovereignty not delegated to the Federal government. *Coyle* v. *Oklahoma*, 221 U. S. 559, 567, 31 S. Ct. 688, 55 L. E. 853. The right of every new state to exercise all the powers of government which belong to or may be exercised by the original states of the Union must be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands. *Sands* v. *Manistee River Improvement Company*, 123 U. S. 288, 8 S. Ct. 113, 31 L. E. 149 and cases cited therein.

The rule of law established in *Sands* v. *Manistee River Improvement Company, supra*, is equally applicable here. The power of taxation is inherent in sovereignty and is an incident of sovereignty. The State of Minnesota on her admission had the right, as an attribute of sovereignty, to exercise this "basic power of government" without any limitation thereon.

D. If Exemption Constitutes Contract Binding on State, Respondent Forfeited "Special Privilege" of Immunity from Taxation by Non-compliance With Charter.

The parties hereto stipulated that the teaching functions of the University were suspended from March, 1869 to September, 1880 inclusive (R. 68, 69).

The petitioner does not claim, as indicated by the decision of the Supreme Court of Minnesota, that respondent's char-

ter has been lost by abandonment or otherwise. Exemption from taxation is not a right, privilege, or immunity which is included within a corporation's franchises. *State* v. *Great Northern Railway Company,* 106 Minn. 303, 119 N. W. 202; *Great Northern Railway Company* v. *Minnesota,* 216 U. S. 206, 30 S. Ct. 344, 54 L. E. 446; *Morgan* v. *Louisiana,* 93 U. S. 217, 23 L. E. 860. The grant of exemption is not one of respondent's "charter rights." It is petitioner's contention that respondent's failure to maintain and conduct an institution of learning as required by its charter constituted, as a matter of law, the forfeiture of its "special privilege" of exemption from taxation without requiring the State of Minnesota to bring a quo warranto action to forfeit the charter. *State* v. *Chicago Great Western Railway Co.,* 106 Minn. 290, 119 N. W. 211; *Trustees of Pillsbury Academy* v. *State, supra.*

Conclusion.

The exemption provision in respondent's charter applies to all its real and personal property regardless of the use made of it. The exemption granted to respondent was not in accord with the general tax laws of the territory enacted in 1851 which subjected all property, except certain classes of property expressly exempted, to taxation on an ad valorem basis. Property owned by a University solely for revenue purposes was not included within the exempt classes of property. The same is true under the State's present constitutional and statutory provisions.

We are endeavoring to bring about a situation in which the respondent will be treated the same as other universities and colleges located in the State of Minnesota. The loss of revenue to the State of Minnesota by reason of this unlimited exemption is now considerable and may become very serious if this exemption grant in perpetuity is sustained. The respondent should bear its proper and equal

burden of taxation along with other taxpayers who own income-producing property. It is not fair to the taxpayers of Minnesota that respondent should be favored by immunity from taxation as to its income-producing property.

We desire to reiterate once more that this Court has never passed on the basic question presented herein relating to the power of the territorial legislature to grant an irrevocable exemption in perpetuity binding on the state. On the basis of the fundamental distinctions between a "territory" and a "state," it may not be necessary to re-examine the decisions in the early *Rouse* cases. We do believe, however, that the rule established in those cases, permitting a state to bargain away its taxing power, is erroneous and should be overruled; at least, it should not be extended to permit the Territory to bargain away the taxing power of a future state.

We submit that the Petition for a writ of certiorari to review the decision of the Supreme Court of the State of Minnesota, involving fundamental Federal constitutional questions, should be granted by this Court.

Respectfully submitted,

MICHAEL J. DILLON,
County Attorney of
Hennepin County,
FRANK J. WILLIAMS,
Assistant County Attorney
of Hennepin County,
KARL W. WINDHORST,
Special Assistant County
Attorney of Hennepin County,
Attorneys for Petitioner,
Minneapolis, Minnesota.

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